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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

AMENDMENTS TO RULES OF PRACTICE	Docket No. PI2021-2

COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO ORDER NO. 5930
(August 26, 2021)

In Order No. 5930, the Commission solicited comments on the following subjects:

1) Whether existing Postal Service regulations implement the current Section 601 exceptions;
2) If so, whether the Commission should adopt or revise those regulations;
3) What private carrier services are within the scope of Section 601(b)(3) and whether regulations are needed to clearly enumerate those services;
4) Whether any exceptions should be clarified to resolve ambiguities;
5) Whether regulations and definitions should be consolidated under one section;
6) Whether redundant and/or conflicting sections should be rescinded; and
7) Whether terminology used in the regulations should be standardized.

Order No. 5930, Notice and Order Providing an Opportunity to Comment on Regulations Pertaining to 39 U.S.C. § 601 (July 2, 2021), at 6–7.

The answer to the first question is straightforward: all of Section 601 except paragraphs (b)(1)–(2) are found in existing regulations, which the statute essentially codified and which the Commission is not at liberty to change. All of the remaining questions are best answered in the negative. The history of administration of the regulations before and after the advent of Section 601, including the comments in

Docket No. RM2020-4, reveals no reason why the regulations under Section 601(c) are necessary at this time, including no confusion over nonstandard terminology (question 7) or supposedly redundant or conflicting provisions (question 6). Nor are any other apparent indications of such confusion apparent. The scope of relevant private-carrier services (question 3) is already clear: any services involving the carriage of letters are within the scope of one or more exceptions. To offer an affirmative definition of covered private-carrier services would risk unduly limiting or misstating the scope of exceptions, breeding its own difficulties. More fundamentally, the Commission lacks the power to revise regulations that Congress has codified (or to otherwise narrow or alter the substantive scope of the monopoly), given the lack of any delegation of authority to the Commission to do so.

The remainder of these comments will discuss, at greater length, the questions enumerated as numbers 1, 2, 4, and 5 above.[1]

I. THE EXISTING REGULATIONS WITHIN THE SCOPE OF SECTION 601 CAN BE CLEARLY IDENTIFIED AND SHOULD REMAIN WITHIN THE EXISTING CODIFICATION STRUCTURE

There is no basis to reformulate the existing regulations subject to Section 601. The longstanding nature of the existing regulations means that the public knows where to find them; recodification could only confuse matters, particularly given Section 601(b)(3)'s explicit reference to existing rule citations. Notably, the Postal Service and several of the mailing-industry and public-interest-oriented commenters in Docket No. RM2020-4 agreed that there is no need to codify new Section 601 provisions in

[1] Question 5 is addressed through the larger discussion of why the Commission should not undertake to reorganize the current regulations, given historical and statutory reliance on the existing structure. Nor is there any formal need to consolidate Parts 310 and 320 for the sake of clarifying the applicability of the 39 C.F.R. § 310.1 definitions: that clarity is already provided by 39 C.F.R. § 320.1.

regulations or to change existing regulations.[2]

Except for two exceptions added by the Postal Accountability and Enhancement Act of 2006 (PAEA)—the price-based exception in Section 601(b)(1) and the weight-based exception in Section 601(b)(2)—all exceptions within the Commission's rulemaking authority were already reflected in Postal Service regulations prior to the PAEA. The postage-payment exception in Section 601(a) was essentially transmuted into regulations via 39 C.F.R. § 310.2(b)(1).[3] The "suspension" exception in Section 601(b)(3) explicitly codifies provisions of 39 C.F.R. Parts 310–320 "that purport to permit private carriage by suspension of the operation of" former Section 601.

In many cases, those codified regulations are self-evident: indeed, Section 601(b)(3) explicitly enumerates, as examples, 39 C.F.R. §§ 310.1 and 320.2–.8. With respect to 39 C.F.R. § 310.1, an explanatory footnote to that section clarifies that

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[2] Comments of the Association for Postal Commerce, PRC Docket No. RM2020-4 (Apr. 7, 2020), at 1 ("[T]o our knowledge no party has raised any issues regarding lack of clarity around the letter monopoly. No PostCom members have indicated that the lack of Commission rules implementing § 601 has caused significant confusion in the marketplace. . . . It is difficult to see how Commission regulations interpreting these standards would increase their clarity. In fact, promulgating regulations to implement this section may create, rather than dispel, confusion."); Comments of Small Business & Entrepreneurship Council, PRC Docket No. RM2020-4 (Apr. 7, 2020) ("[T]he established frameworks for letter mail delivery are already clear, concise, and consistent with respect to the long-held collective understanding of small business communities. . . . [F]urther definition of letters carried out by mail and changes to the scope of monopoly would present only limited marginal benefits, while also introducing substantial unknown consequences in maintaining systems through which small businesses interact with their customers and partners, identify new clients, and complete deliveries. Preserving a narrow set of definitions pertaining to letter delivery is the most advisable course of action."); Comments of American Consumer Institute Center for Citizen Research, PRC Docket No. RM2020-4 (Apr. 6, 2020), at 1 (characterizing Section 601 as "succinct and clear" and "comprehensively written," and calling for "[a]ffirming the current statutes without any modifications or expansions to the current regulations"); Comments of Taxpayers Protection Alliance, PRC Docket No. RM2020-4 (Apr. 6, 2020), at 1 ("In TPA's view, there is no current, pressing issue with the definition of mail subject to USPS monopoly."). *See also* Public Representative Comments, PRC Docket No. RM2020-4 (Apr. 7, 2020), at 21–22, 58 (disclaiming any need for regulations to carry out Section 601(b)(1)–(2), as "[t]he Public Representative is not aware of any controversy having arisen about this section since its enactment[and t]here does not appear to be a need now for a regulation mimicking the statute").

[3] The regulation does feature some variations on the statutory text: these are discussed in footnote 5 below.

exclusions from the "letter" definition enumerated in paragraph (a)(7) fall under a suspension to the extent that they "do not self-evidently lie outside of the definition of 'letter'." This note long predates the PAEA, and so, since the Postal Service specifically "purported" that these particular provisions of 39 C.F.R. § 310.1 were suspensions, it can reasonably be inferred that the definitional exclusions in 39 C.F.R. § 310.1(a)(7) fall within the scope of the reference to 39 C.F.R. § 310.1. *See, e.g.*, *ICC v. Texas*, 479 U.S. 450, 458 (1987) (Congress is presumed to be aware of preexisting regulatory interpretation when it incorporates a term into legislation).

Section 601(b)(3)'s use of the phrase "including, in particular" indicates that other 39 C.F.R. Parts 310–320 provisions can fall within its scope. As an adjunct to the postage-payment exception in 39 C.F.R. § 310.2(b)(1) (implementing Section 601(a)), the Postal Service provided that shippers or carriers can enter into negotiated alternative-payment agreements with the Postal Service that deviate from the requirements for that exception. 39 C.F.R. § 310.2(b)(2).[4] This alternative-payment exception, while self-consciously "differ[ing] from" the terms of Section 601(a), is simultaneously rooted in that provision: the Postal Service introduced it simply to "authorize payment of postage in ways (which may differ from one firm to another) that are more convenient than the existing procedures, while ensuring that the Postal Service receives the revenue to which it is entitled under the Private Express Statutes.."

[4] The Public Representative suggests that, despite Congress's codification, the terms of this provision should be revised such that only the Commission, and not the Postal Service, should determine permissible alternative payment methods. *See* Public Representative Comments, PRC Docket No. RM2020-4, at 17, 20. Such a revision of a statutorily codified provision would be *ultra vires*: Congress did not allow the Commission to blue-pencil the existing regulation and arrogate for itself authority to dictate acceptable payment methods or other administrative matters, where the existing regulation allows for negotiation between the Postal Service (as the operator) and counter-parties. Nor would it make practical sense for the Commission to dictate such operational and technical details.

45 Fed. Reg. 77,828, 77,829 (1980). The administrative extension of Section 601(a) is, in essence, a Postal Service undertaking to suspend the application of the Private Express Statutes with respect to shippers or carriers who entered into covered contractual arrangements. Thus, insofar as 39 C.F.R. § 310.2(b)(2) extends beyond Section 601(a), it is now codified via Section 601(b)(3).[5]

Returning to the definitions in 39 C.F.R. § 310.1, no other aspect of that section can fairly be characterized as within the scope of any Commission jurisdiction under Section 601. Certain provisions do clarify that certain matter is outside the definition of a "letter," but they do so only in self-evident ways: hardly an exercise of purported authority to suspend the monopoly as to otherwise covered matter. *E.g.*, 39 C.F.R. § 310.1(a)(1)(i)–(ii) ("letter" does not include objects unsuitable for long-distance communications, unless actually used thus, or objects incapable of enclosure in common letter covers). Other aspects of the "letter" definition distinguish excluded matter in ways that are intertwined with their explication of what is included; given the difficulty of teasing apart the affirmative definition and the exclusion, such provisions do not rise to the level of outright suspensions in the sense of Section 601(b)(3). *E.g.*, *id.* at (a)(3), (6) (clarifying when letters are "directed to a specific person or address," with examples of when letters are not so directed). Still other definitions are stated in the

[5] In this regard, the Public Representative is incorrect insofar as he suggests that 39 C.F.R. § 310.2(b)(2) can be eliminated or revised. *See* Public Representative Comments, PRC Docket No. RM2020-4, at 16. The same is true of aspects of 39 C.F.R. § 310.2(b)(1) that could be viewed as extending beyond the Section 601(a). *See id.* at 15. Section 601(a) predates the PAEA, and so, to the extent that the Postal Service's implementing regulations under its former authority granted private carriers additional leeway (e.g., by allowing private carriage in a "suitable cover" other than an envelope, or by allowing payment through methods other than postage stamps or meter), that leeway constitutes another *de facto* instance of a "purported suspension." Thus, even if those aspects of 39 C.F.R. § 310.2(b)(1) are not fixed by Section 601(a), they are nonetheless fixed by Section 601(b)(3). To be fair, the Public Representative himself ultimately appears to agree that the Commission cannot retract these implied suspensions. *Id.* at 17; *see id.* at 27–28 (characterizing 39 C.F.R. § 310.2(b)(2) as a "suspension").

affirmative, leaving any excluded matter to be merely implied, not "purported." *See id.* at (b), (d), (g). Moreover, as discussed in the next section, Congress's intent was clear in reserving to itself the power to further adjust the letter monopoly through alterations in the scope of a covered "letter" or otherwise.

Thus, the following regulations are within the scope of Section 601: 39 C.F.R. §§ 310.1(a)(7), 310.2(b)(1)–(2), and 320.2–.8. Those provisions correspond to Section 601(a) (in the case of 39 C.F.R. § 310.2(b)(1) generally) and Section 601(b)(3) (in all other cases, and arguably with respect to certain aspects of 39 C.F.R. § 310.2(b)(1)).[6] Any rulemaking authority conferred upon the Commission by Section 601(c) extends only to those C.F.R. provisions, and not to any other provisions of 39 C.F.R. Parts 310–320.

The Commission should not undertake to "adopt" those regulations by extricating them from their current location in Chapter I of Title 39, C.F.R. and moving them to Chapter III of Title 39, C.F.R. To be sure, a formal argument could be made for doing so: Chapter I is administered by the Postal Service, whereas Chapter III is administered by the Commission, and so a shift arguably would better communicate lines of authority as a technical matter. But the shift would also create an undue risk of confusion and inconvenience for interested persons, which could easily outweigh any communicative benefit. Section 601(b)(3) explicitly references the existing regulatory structure, as does the body of advisory opinions that interested parties might consult for historical guidance. Any piecemeal recodification would have to be accompanied by a series of cross-references that would send a reader on a scavenger hunt across separate

[6] See the preceding footnote.

portions of Title 39, C.F.R., and complicate, if not confuse and frustrate, their attempts to research and understand the law. *See* Public Representative Comments, PRC Docket No. RM2020-4, at 59–60 (recommending "a single source of authoritative regulations easily accessible by interested persons" and disfavoring "parallel sets of regulations" as "cumbersome" even with "appropriate cross-references").

Although no changes are necessary, if the Commission nonetheless does determine to make some clarifying changes, a simpler solution would be to leave the regulations in their traditional spot, with certain clarifications and updates. One or more interpretive notes could be added to signal which provisions are subject to the Commission's rulemaking authority. Alternatively, a new provision could explicitly clarify that, notwithstanding the placement of Parts 310–320 in the "Postal Service" chapter, certain specified provisions are now codified by Section 601, and that the authority to interpret or clarify those provisions now lies with the Commission.

Moreover, the Postal Service recognizes that various administrative provisions of Parts 310–320 that are beyond the Commission's Section 601 authority nonetheless warrant updating. For instance, current sections 310.2(c) (suspension), 310.7 (amendment), and 320.9 (revocation/amendment of suspensions) are no longer operative, and some additional minor, cosmetic edits may be warranted to conform to the PAEA. As the Executive Branch entity responsible for those regulations, the Postal Service will undertake the revisions. In the interest of comity, the Postal Service will consult with the Commission on the draft rulemaking materials prior to issuance.

This approach would appropriately balance the Commission's interest in communicating lines of authority and interested parties' interest in simplicity of cross-

references in Section 601(b)(3) and historical advisory opinions. While other approaches may be possible (e.g., creating a new, jointly-administered chapter of Title 39, C.F.R.), they would not strike as effective a balance.

II. THE COMMISSION'S RULEMAKING AUTHORITY DOES NOT EXTEND TO REVISING THE REGULATIONS SUBJECT TO SECTION 601

Congress codified 39 C.F.R. §§ 310.1(a)(7), 310.2(b)(2), and 320.2–.8 in their current form. 39 U.S.C. § 601(b)(3). It authorized the Commission only to promulgate "[a]ny regulations necessary to carry out" Section 601, *id.* at (c) (emphasis added). "Carry out" plainly means to follow pre-established parameters, not to rewrite them. *See* Carry out (verb), Merriam-Webster.com (last visited Aug. 26, 2021) ("to bring to a successful issue : complete, accomplish; to put into execution").[7] The PAEA's framers clearly knew how to delegate such modification authority to the Commission. *See id.* §§ 3621(a), 3631(a)) (specifying lists of market-dominant and competitive products, "subject to any changes the Postal Regulatory Commission may make under section 3642"); *id.* § 3622(d)(3) (authorizing the Commission to modify or replace the initial market-dominant rate-regulation system). The contrasting lack of modification authority in Section 601 could not be more clear.[8]

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[7] For example, the phrase is often employed in the context of workers following instructions or policies, not dictating or changing them. *See, e.g.*, *Suzanne I. v. Saul*, No. 19-1213-JWL, 2020 WL 2747184, at *1–*6 (D. Kan. May 27, 2020); *Deschryver v. Berryhill*, No. 2:16-cv-0146-TLN-CKD, 2017 WL 531841, at *5–*7 (E.D. Cal. Feb. 9, 2017); *Abney v. Colvin*, No. 13-6818, 2015 WL 5113315, at *2 n3, *3 & n4 (E.D. Pa. Aug. 31, 2015); U.S. Dep't of Labor, 1 Dictionary of Occupational Titles xxi (4th ed. 1991) (element statements "indicate how the worker actually carries out the job duties"); *id.* at 43 (submersible pilots "carry out mission in accordance with operational plans"); *id.* at 126 (irrigation district managers "[p]repare[ ] directives to carry out policies approved by board" and can only "[r]ecommend[ ] changes in policy," not actually determine them).

[8] In this regard, UPS and FedEx are mistaken about the Commission's supposed authority to redefine "letter." *See* Comments of United Parcel Service, Inc. on Advance Notice of Proposed Rulemaking to Consider Regulations to Carry Out the Statutory Requirements of 39 U.S.C. § 601 [hereinafter "UPS Comments"], PRC Docket No. RM2020-4 (Apr. 7, 2020), at 1–5; Comments of FedEx Corporation, PRC

In fact, prior to the PAEA, the Postal Service had interpreted former Section 601(b) as authorizing it to effectively create new exceptions to the letter monopoly (including by "suspending" the application of the monopoly to certain private activity, excluding matter from the definition of a "letter," and other regulatory means),[9] and the PAEA's framers were explicit about their intent to preclude any such administrative authority and to retain Congressional control over the letter monopoly's scope. H.R. REP. NO. 109-66, pt. 1, at 57–58 (2005); S. REP. NO. 108-318, at 32 (2004). The PAEA's framers viewed Section 601(b)(3) as locking in the existing regulatory exceptions to protect mailers and private carriers benefitting from them.[10] They also

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Docket No. RM2020-4 (Apr. 7, 2020), at 1–12. As discussed in the main text that follows, Congress clearly intended to reserve to itself, and not to delegate to the Commission, the power to modify the current "letter" definition. Nor can the Commission's general rulemaking authority in 39 U.S.C. § 503 do the work that UPS claims, *see* UPS Comments at 1–3, as that broad provision cannot be construed to allow the Commission to vitiate the express statutory parameters of Section 601 or the more specific limited delegation in Section 601(c). *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (citations omitted).

[9] *See, e.g.*, *H.R. 3717, the Postal Reform Act of 1996: Hearings Before the Subcomm. on the Postal Serv. of the House Comm. on Gov't Reform & Oversight*, 104th Cong. at 159–60 (1996) (responses by Postmaster General and Chief Executive Officer Marvin T. Runyon to questions for the record). The Postal Rate Commission opposed this interpretation, instead asserting that the Postal Service was authorized only to suspend the postage-payment exception (thereby broadening, not narrowing, the monopoly's scope). *See* H.R. REP. NO. 109-66, pt. 1, at 57–58. Thus, the Commission's position even before the PAEA was that only Congress can modify or augment the statutory exceptions.

[10] H.R. REP. NO. 109-66, pt. 1, at 58 ("The 'grandfather clause' provided in the bill will authorize the continuation of private activities that the Postal Service has permitted under color of this section. In this way, the bill protects mailers and private carriers who have relied upon regulations that the Postal Service has adopted to date[.]"); S. REP. NO. 108-318 at 32 (Section 601(b)(3) "codif[ies] the current postal monopoly suspensions[,] thus permitting continued private sector provision of services to these markets"). The possibility of administrative rescission of the suspensions had long concerned mailers and carriers. *See, e.g.*, *The Private Express Statutes: Hearings Before the Subcomm. on Postal Serv. of the House Comm. on Post Off. & Civil Serv.*, 93d Cong. at 6, 9–10, 98–99, 130–32, 136, 148–49, 153–54, 157, 164, 166–68, 170 (1973) (testimony on behalf of the Associated Third-Class Mail Users; Reader's Digest Services, Inc.; Courier Express Corp.; MPA, Inc.; Brinks Armored Car Services, Inc.; Purolator Services, Inc.) (voicing concerns that administrative revocation of suspensions could harm mailers, private carriers, and freedom of the press); *see also Private Express Statutes: Hearings Before the Subcomm. on Postal Operations & Servs. of the House Comm. on Post Off. & Civil Serv.*, 96th Cong. at 136 (1979) (written statement of Arthur Eden, Senior Consultant, National Economic Research Assocs., Inc.) (same); *see also Effectiveness of the Postal Reorganization Act of 1970, Part 2: Joint Hearings Before the Subcomm.*

rejected a recommendation by the President's Commission on the United States Postal Service that the Commission "be granted the authority to refine the scope of the mail monopoly[,]" because

> [f]rom the perspective of the Committee, both the postal monopoly and universal service are issues of broad public policy—not regulatory issues. For that reason, the Committee decided that the power to refine either the monopoly or the universal service obligation should remain in the hands of Congress. However, the Committee thought it would be helpful to hear from the Regulatory Commission what potential changes to either the monopoly or the universal service obligation they believed made sense. Congress would then have the option to enact any of the Regulatory Commission's recommendations with which they agreed.

S. REP. NO. 108-318 at 39.

In light of these specific expressions of intent, nothing in the PAEA or its legislative history indicates that Congress's conferral of rulemaking authority on the Commission would allow the Commission to modify, create, or abolish exceptions to the letter monopoly. Rather, Congress's intent in the PAEA is clear: it wanted to clarify the application of the monopoly through its amendments to Section 601, while reserving to itself the question as to whether to further redefine the scope of the monopoly in the future. This approach makes sense, because redefining the scope of the monopoly should occur only as part of a comprehensive reexamination of the Postal Service's legal obligations and funding mechanisms: a task that only Congress can perform.[11]

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on Postal Operations & Servs. and the Subcomm. on Postal Personnel & Modernization of the House Comm. on Post Off. & Civil Serv., 97th Cong. at 396–97 (1982) (written statement of Timothy J. May, Reader's Digest, Inc.) (noting that Reader's Digest's lack of concern over "substantial oppression of private enterprise" through administrative definition of the letter monopoly's scope depended on the then-existing regulations remaining in force).

[11] As the Government Accountability Office noted in its prior study of the monopolies, there was "broad consensus" among postal stakeholders that considering whether to change the scope of the monopoly should take place only within the context of analyzing postal policy generally, including the universal service obligation. Gov't Accountability Off., GAO-17-543, U.S. Postal Service, Key Considerations for Potential Changes to USPS's Monopolies 15 (2017).

III. THE INTERACTION BETWEEN THE PRICE TEST AND THE EXTREMELY URGENT SUSPENSION IS SUFFICIENTLY CLEAR

There is no need for clarification of the existing rules or Section 601(b)(1)–(2) at this time. Since the PAEA's enactment, no party has petitioned the Commission to issue rules clarifying any aspect of Section 601, nor has any party filed a complaint alleging that the Postal Service has misapplied Section 601. If anything, that silence indicates that Section 601 is working as its framers intended. *See* S. REP. NO. 108-318 at 31 ("By establishing a clear price- and weight-based monopoly definition [under 39 U.S.C. § 601(b)(1)–(2)], both customers and competitors will be able easily to determine when a mail piece is subject to monopoly protections."). With respect to the legacy aspects of Section 601—the postage-payment exception and the codified "suspensions"—the substantive law has been in place for decades. The substantial slowdown in requests for advisory opinions before and since the PAEA suggests that the public understanding of these statutory and regulatory provisions is fairly settled.[12] The comments in Docket No. RM2020-4 further belie any substantial interest in clarification at this time. That said, a slight overstatement in Order No. 5930 indicates some potential for confusion regarding the interaction between Section 601(b)(1) and the price-based presumption in 39 C.F.R. § 320.6(c). *See* Order No. 5930 at 6 (claiming, without further qualification, that the former "supersedes" the latter).

Although much has been made of the price-based provision of the "extremely

[12] According to available records, approximately 155 advisory opinions were issued during the 1970s, 85 during the 1980s, 23 during the 1990s, and only 1 during the 2000s (before enactment of the PAEA). None has been issued since the PAEA, and post-PAEA informal correspondence from members of the public to the Postal Service about the letter monopoly has been "infrequent." *See* Responses of the United States Postal Service to Questions 1–3 of Chairman's Information Request No. 1, PRC Docket No. RM2020-4 (Mar. 11, 2020), at 4 (responses to questions 2.c–.e).

urgent" exception, 39 C.F.R. § 320.6(c), that provision is not the primary test. Rather, the heart of the exception consists of (1) a series of delivery-time parameters and (2) a requirement that the value or utility of the letter would be lost or greatly diminished if not delivered within those parameters. *Id.* at (b). As an adjunct to that primary rule, there is a "conclusive presumption" that a letter must be "extremely urgent" if the shipper is willing to pay the carrier "at least three dollars or twice the applicable U.S. postage for First-Class Mail (including priority mail)[,] whichever is greater." *Id.* at (c). This presumption applies as far as it goes, but it does not otherwise supersede the primary test for "extremely urgent" status. In other words, private carriage priced above the price threshold is presumed to be "extremely urgent," but private carriage below the price threshold may also be "extremely urgent" on the basis of the delivery-time parameters and the nature of the letter.

What then, of the interaction between the price-based presumption of "extremely urgent" status and Section 601(b)(1)'s price-based exception? It should be clear to any reader that the two overlap and that one may, at times, have more practical relevance than the other. But it should be just as clear that neither conclusively "supersedes" the other, contrary to the suggestion in Order No. 5930. Note again that Section 601(b)(1) establishes a fixed threshold, insensitive to characteristics of the letter in question; by contrast, the "extremely urgent" presumption is based on the higher of $3.00 or double the "applicable postage" for the letter. Specifically, "applicable postage" is measured at the rate for "First-Class Mail (including priority mail)." Assuming that Priority Mail

postage would apply,[13] then the "extremely urgent" presumption's price threshold for a letter weighing less than 12-1/2 ounces would, at current prices, be in the range of approximately $14–$33 (= 2 x ($7.16 to $16.85)),[14] depending on zone and whether the customer would qualify for commercial pricing. Obviously, under current conditions, the Section 601(b)(1) price test sets a far lower bar to private carriage of letters weighing less than 12-1/2 ounces. And given historical market forces and pricing patterns for First-Class Mail prices (relevant to Section 601(b)(1)) and Priority Mail prices (relevant to 39 C.F.R. § 320.6(c)), it might be unlikely that six times the basic rate would ever exceed twice the lowest Priority Mail price (let alone other potentially applicable Priority Mail prices). Mathematically speaking, however, it is not beyond the realm of possibility.[15] Hence, it cannot be said that the advent of Section 601(b)(1) absolutely superseded 39 C.F.R. § 320.6(c), let alone impliedly repealed it. To the contrary, Congress expressly codified the entirety of 39 C.F.R. § 320.6. There is no basis for the Commission to order it modified or deleted.

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[13] When the rule was promulgated, Priority Mail was a subclass within First-Class Mail, and so the two-tier description was necessary. That the products have since been reclassified should not affect the substance of the rule—particularly given that letters remain eligible for Priority Mail. Hence, to the extent that a letter is eligible to be mailed as Priority Mail, the "applicable postage" would be some appropriate Priority Mail price, since Priority Mail prices are "greater" than First-Class Mail prices, *see* 39 C.F.R. § 320.6(c), and since shippers perceiving a sense of urgency would almost certainly favor Priority Mail as a more expedited service than First-Class Mail. It should be noted that all mailable matter eligible for First-Class Mail is also eligible for Priority Mail. *See* Mailing Standards of the United States Postal Service, *Domestic Mail Manual* §§ 123.3.1–2, 133.3.1–.4.

[14] The lower bound is the price for a commercial Priority Mail item up to 1 pound travelling locally or within zones 1–2. The upper bound is the price for a retail Priority Mail item up to 1 pound travelling within zone 9.

[15] As an illustrative example, start with, in Year 0, a basic rate of $0.58 and a Priority Mail price of $7.16. Assume, hypothetically, that the former increases at 9.0 percent per year and the latter at 4.5 percent per year. In that scenario, the 39 C.F.R. § 320.6(c) threshold (twice the applicable Priority Mail price) would fall below the Section 601(b)(1) threshold (six times the basic rate) after thirty-four years and remain increasingly so thereafter. The point here is simply that such a scenario is mathematically possible and therefore cannot be entirely ruled out; that said, this illustration should not be taken as any representation that such long-run pricing patterns are reasonably likely.

IV. CONCLUSION

Congress has delegated to the Commission only very narrow authority to "carry out"—not to modify—a subset of the statutory parameters for the letter monopoly. Those parameters expressly lock in place the preexisting regulations. Hence, the Commission cannot modify the substance of those regulations; its rulemaking authority extends only so far as establishing procedures and exercising interpretive authority as to the specified exceptions, including through rulemakings to promulgate interpretive notes to be appended to the existing regulations.

Relocating the regulations within the Commission's authority would be more trouble than it is worth. Any potential concerns arising from the regulations' current location in the "Postal Service" chapter of Title 39, C.F.R., can be solved through less problematic means.

With respect to clarification of the exceptions, no need for such clarification is apparent at this time. Although Order No. 5930 somewhat overstated the significance of the overlap between Section 601(b)(1) and 39 C.F.R. § 320.6(c), the interaction between the two provisions is clear enough from their text.

Respectfully submitted,

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